-599

IN THE

Supreme Court of the United States

FILED

OCT 13 1972

MICHAEL RODAK, JR., CLERK

October Term, 1972

No. .....

72-599

In the Matter of

LOS ANGELES TRUST DEED & MORTGAGE EXCHANGE, a California corporation, and dba TRUST DEED & MORTGAGE MARKETS, a California corporation,

Bankrupt.

STANLEY A. PHIPPS, JAMES A. A. SMITH, GEORGE E. DANIELSON, Trustees,

Petitioners,

vs.

ASSOCIATE FUNDINGS, INC., a California corporation, BRENTWOOD DOWNS, INC., a California corporation, WESTPORT DEVELOPMENT COMPANY, a co-partnership composed of E. J. CANTILLON and A. W. RABALAIS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MARTIN GENDEL,
RICHARD F. BROUDE,
6380 Wilshire Boulevard,
Los Angeles, Calif. 90048,
Attorneys for Stanley Phipps, James A. A. Smith and George E. Danielson, Trustees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rule Involved	2
Statement of the Case	5
Argument for Granting Writ	7
A. Whether a Bankruptcy Court Has Summary Jurisdiction Over Unrelated or "Permissive" Counterclaims Is One of the Most Important but Unresolved Issues in Bankruptcy Administration	7
B. Section 2a(7) of the Bankruptcy Act Does Not Apply to a Counterclaim Asserted by a Trustee in Bankruptcy	18
Appendix. Findings of Facts and Conclusions of Law Re Joint Venture	App. p. 1
Order Declaring Dissolution of Joint Venture for Payment of Money	8
Order Affirming Order of Referee in Bankruptcy	10

TABLE OF AUTHORITIES CITED

Cases	Page
Alexander v. Hillman, 296 U.S. 222 (1935)	7, 9, 12
Behring & Behring, In re, 445 F.2d 1096 (5th Cir.), cert. denied, 404 U.S. 991 (1971)	7
Carnell Const. Corp., In re, 424 F.2d 296 (3rd Cir.), cert. denied, 400 U.S. 828 (1970)	7
Katchen v. Landy, 336 F.2d 535 (10th Cir. 1964)	11
Katchen v. Landy, 382 U.S. 323 (1966)	7, 10
Local Loan Co. v. Hunt, 292 U.S. 234 (1934)	9
Majestic Radio & Television Corp., In re, 227 F.2d 152 (7th Cir. 1955) cert. denied 350 U.S. 995	10
Pepper v. Litton, 308 U.S. 295 (1939)	9
Peters v. Lines, 275 F.2d 919 (9th Cir. 1960)	10
Seatrade Corp., In re, 297 F.Supp. 577 (S.D.-N.Y. 1966)	15
Solar Mfg. Corp., In re, 200 F.2d 327 (3rd Cir. 1952), cert. denied 345 U.S. 940	10
Miscellaneous	
General Order 37	17
Rules	
Bankruptcy Rules, Rule 203(a)	4
Federal Rule of Civil Procedure 13(b)	17, 18
Statutes	
Bankruptcy Act, Sec. 2a	2
Bankruptcy Act, Sec. 2a(2)	2
Bankruptcy Act, Sec. 2a(7)	2, 18, 19
Bankruptcy Act, Sec. 2a(15)	2
Bankruptcy Act, Sec. 57g	4, 9, 10, 12, 13, 14, 15

Page

Bankruptcy Act, Sec. 57k 4
Bankruptcy Act, Sec. 57 l 4
Bankruptcy Act, Sec. 68 16
United States Code, Title 11, Sec. 11a 2
United States Code, Title 11, Sec. 11a(2) 2
United States Code, Title 11, Sec. 11a(7) 2
United States Code, Title 11, Sec. 47c 2
United States Code, Title 11, Sec. 93g 4, 9
United States Code, Title 11, Sec. 93k 4
United States Code, Title 11, Sec. 93 l 4
United States Code, Title 11, Sec. 108 16
United States Code, Title 11a(7) 2
United States Code, Title 11a(15) 2
United States Code, Title 28, Sec. 1254(1) 2

Textbooks

4 Collier on Bankruptcy, Par. 68.20[4] at 951 (14th ed. 1971) 17

Macey, Katchen v. Landy: The Summary Jurisdiction Road, 71 Com. L.J. 68, 69 (1966) 14

Palmer, The Supreme Court Speaks On Bankruptcy, 40 Ref. J. 44, 45 (1966) 15

Rochelle and King, Summary Jurisdiction in Bankruptcy: Katchen v. Landy and Questions Left Unanswered, 1966 Duke L.J. 669, 680-681 .....10, 14, 19

Seidman, Katchen v. Landy—Some Implications, 71 Com. L.J. 241, 243 (1966) 10, 14

Seligson and King, Jurisdiction and Venue in Bankruptcy, 36 Ref. J. 73, 83 (1962) 15

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

In the Matter of

LOS ANGELES TRUST DEED & MORTGAGE EXCHANGE, a California corporation, and dba TRUST DEED & MORTGAGE MARKETS, a California corporation,

Bankrupt.

STANLEY A. PHIPPS, JAMES A. A. SMITH, GEORGE E. DANIELSON, Trustees,

Petitioners,

vs.

ASSOCIATE FUNDINGS, INC., a California corporation, BRENTWOOD DOWNS, INC., a California corporation, WESTPORT DEVELOPMENT COMPANY, a co-partnership composed of E. J. CANTILLON and A. W. RABALAIS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Stanley A. Phipps, James A. A. Smith and George E. Danielson, Trustees, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered July 17, 1972.

Citations to Opinions Below.

The Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy are unpublished and unreported, but are printed in the Appendix hereto at pages 1 to 9. The District Court entered an Order (printed in the Appendix at pages 10 to 11) af-

firming the Referee in Bankruptcy, which is unreported. The opinion of the Court of Appeals is reported at .... F.2d .... and is printed in the Appendix hereto at pages 12 through 20.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered July 17, 1972. Petitioners' Motion to Extend Time for Filing of Petition for Rehearing Under Rule 26b of the Federal Rules of Appellate Procedure was denied on August 23, 1972. Jurisdiction of this Court is invoked pursuant to 11 U.S.C. §47c and 28 U.S.C. §1254(1).

Questions Presented.

1. Does a Bankruptcy Court have jurisdiction to hear an unrelated or "permissive" counterclaim filed by a Trustee in Bankruptcy in response to a creditor's Proof of Claim?

2. Does Section 2a(7) of the Bankruptcy Act, 11 U.S.C. §11a(7), apply to a counterclaim filed by a Trustee in Bankruptcy in response to a creditor's Proof of Claim?

Statutes and Rule Involved.

a. 11 U.S.C., §11a, Preamble, and subsections 11a(2), (7) and (15), Section 2a of the Bankruptcy Act, Preamble, and subsections 2a(2), (7) and (15):

"§2. . . .

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter

changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

. . .

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

. . .

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

. . .

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for

the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;"

b. 11 U.S.C. §93 g, §57g of the Bankruptcy Act:

"g. The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."

c. 11 U.S.C. §93 k, §57k of the Bankruptcy Act:

"k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

d. 11 U.S.C. §93 l, §57 l of the Bankruptcy Act:

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received from the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor. The court shall have summary jurisdiction of a proceeding by the trustee to recover any such dividends."

e. Rule 203(a) of the Bankruptcy Rules, United States District Court for the Central District of California:

"A respondent desiring to contest a summary proceeding against him, shall serve and file not

less than two (2) days before the hearing a written answer, objection or other responsive pleading which shall be verified if it sets up matters of fact."

Statement of the Case.

These proceedings were commenced in 1960 by the filing of an involuntary petition in bankruptcy against Los Angeles Trust Deed & Mortgage Exchange, a California corporation ("LATD"). LATD was adjudicated a bankrupt on December 18, 1960. Petitioners thereafter assumed their offices as Co-Trustees in Bankruptcy. One of the first undertakings of the Trustees was an investigation of the affairs of LATD's president, David Farrell. As a result of this investigation, a settlement was made between Mr. Farrell and the Trustees, consummated in an Order made and entered on November 28, 1962.

During their investigation, the Trustees discovered that, during 1958 and 1959, Mr. Farrell had entered into a series of written agreements with Westport Development, a partnership composed of E. J. Cantillon and A. W. Rabalais, and Associate Fundings, Inc. and Brentwood Downs, Inc., corporations in which Messrs. Cantillon and Rabalais were principals (hereinafter collectively referred to as the "Respondents"). These agreements, executed at different times and relating to different and separate tracts of land, were part of financing arrangements between LATD and the Respondents, and each provided that Farrell was to receive 50% of any net profits resulting from the tracts. In the Order of Compromise referred to above, Farrell's interest in these agreements was, *inter alia*, assigned to the Trustees.

In 1961 Respondents filed proofs of claim in the LATD estate, claiming that moneys were due from loans allegedly promised by LATD to develop two of the tracts, subject to the aforedescribed agreements. On July 29, 1966, the Trustees filed a counterclaim praying that the Referee dissolve the Cantillon-Rabalais-Farrell joint ventures and order payment to the Trustees of 50% of the profits earned on five tracts which were not included in the claims filed by Respondents. Respondents' Answer, filed October 7, 1966, did not object to the jurisdiction of the bankruptcy court over the Trustees' counterclaims. However, on the same day a meeting in the nature of a pretrial conference was held between the Referee, counsel for the Trustees, and counsel for Respondents, in which an oral objection to the jurisdiction of the Referee was made. An Amended Answer was filed by Respondents on February 8, 1967, raising for the first time in a written pleading the additional defense of lack of jurisdiction.

Following the filing of stipulations of fact and extensive briefs, the Referee in Bankruptcy ordered that the joint ventures be dissolved, and ordered the Respondents to turn over to the Trustees 50% of the net profits on the tracts involved. This Order was affirmed by the United States District Court, but was reversed on appeal by the United States Court of Appeals for the Ninth Circuit.

ARGUMENT FOR GRANTING WRIT.

A. Whether a Bankruptcy Court Has Summary Jurisdiction Over Unrelated or "Permissive" Counterclaims Is One of the Most Important but Unresolved Issues in Bankruptcy Administration.

This Court has not yet addressed itself to the issue presented by this case, one which has important and far-reaching consequences for the administration of bankrupt estates. Three Circuit Courts of Appeal have now taken the position that a bankruptcy court does not have jurisdiction to determine and render relief upon unrelated or permissive counterclaims filed by a Trustee in Bankruptcy in response to claims filed by creditors of the estate. In addition to the decision from which this Petition is taken, identical results have been reached in *In re Carnell Const. Corp.*, 424 F.2d 296 (3rd Cir.), *cert. denied*, 400 U.S. 828 (1970), and *In re Behring & Behring*, 445 F.2d 1096 (5th Cir.), *cert. denied*, 404 U.S. 991 (1971). These cases constitute a misreading and a misconstruction of the philosophy of bankruptcy administration adopted by this Court in *Katchen v. Landy*, 382 U.S. 323 (1966). Moreover, the result reached in these cases constitutes a serious impediment to the expeditious, inexpensive and efficient administration of bankrupt estates.

The issue presented by this Petition has its genesis in a non-bankruptcy proceeding, *Alexander v. Hillman*, 296 U.S. 222 (1935), a case which involved a federal receivership of a corporation. Claims were filed by ex-officers of the corporation. These claims were founded upon advances which the claimants had made during the course of certain litigation involving the corporation, and for unpaid salaries and expenses. The

receivers' counterclaims, which were unrelated to the claims, sounded in fraud and were based upon the claimants' alleged mismanagement in running the corporation. An appeal was taken from a decision holding that the United States District Court had jurisdiction to pass on defenses which had been asserted by the receivers against the claims, but that an affirmative judgment on the counterclaims could not be entered. In reversing, this Court rightfully noted that such a result is internally inconsistent and, moreover, is hardly salubrious for the most efficient administration of such an estate:

> "[Claimants'] contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, [claimants] may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. [Cits.] Distribution may not be made without decision upon the counterclaims. Nothing is more clearly a part of the subject-matter of the main suit than recovery of all that to the res belongs. [Cits.]" (296 U.S. at 241-42).

This Court went on to state that there was no reason for the receivers to have to split their causes of action; moreover, that it would be extremely difficult to determine just what is a "defense", which had been held

by the court below to be within the jurisdiction of the equity court, and what is a "counterclaim", without its jurisdiction. The determination of the answer to that question

> "would introduce additional elements of uncertainty and would involve unnecessary delay. . . . Unquestionably all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere." (*Id.* at 243).

Alexander v. Hillman has continued to this day to exert great influence upon decisions involving the administration of estates in bankruptcy. After all, a court of bankruptcy is as much a court of equity as was the receivership court involved in that case. *Pepper v. Litton,* 308 U.S. 295 (1939); *Local Loan Co. v. Hunt,* 292 U.S. 234 (1934).

As the cases involving bankruptcy administration developed, certain patterns and discrete categories of problem emerged. Once a claim is filed by an alleged creditor, a trustee may assert any one of a number of counterclaims. These consist of:

Type 1. A so-called §57g counterclaim which arises out of the same transaction as that which gave rise to the claim. Section 57g of the Bankruptcy Act, 11 U.S.C. §93g provides:

> "The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."

Type 2. A §57g counterclaim which arose out of a different transaction than that which gave rise to the claim.

Type 3. A non-§57g counterclaim which arose out of the same transaction as that which gave rise to the claim.

Type 4. A non-§57g counterclaim which arose out of a different transaction than that which gave rise to the claim.

This Court, in *Katchen v. Landy, supra,* specifically held that a Type 1 counterclaim was within the summary jurisdiction of the bankruptcy court. The commentators have uniformly inferred that *Katchen v. Landy* held that a Type 2 counterclaim was also within that summary jurisdiction. Seidman, *Katchen v. Landy —Some Implications,* 71 Com. L.J. 241, 243 (1966); Rochelle & King, *Summary Jurisdiction in Bankruptcy: Katchen v. Landy and Questions Left Unanswered,* 1966 Duke L.J. 669, 680. *Peters v. Lines,* 275 F.2d 919 (9th Cir. 1960), *In re Solar Mfg. Corp.,* 200 F.2d 327 (3d Cir. 1952), *cert. denied* 345 U.S. 940, and *In re Majestic Radio & Television Corp.,* 227 F.2d 152 (7th Cir. 1955), *cert. denied* 350 U.S. 995, have all held that Type 3 counterclaims are within the summary jurisdiction of the bankruptcy court.

The case at bar squarely presents the issue of whether Type 4 counterclaims may be asserted by a Trustee in a bankruptcy proceeding and whether the bankruptcy court has summary jurisdiction to render affirmative relief on that type of counterclaim.

In answering the question presented by this case, the philosophy of *Katchen v. Landy* should, of course, be determinative. In *Katchen,* two claims had been filed

by an officer of a bankrupt corporation, one for rent due him from the bankrupt and one based upon a payment which he had made on a promissory note of the bankrupt upon which he was an accommodation maker. The Trustee responded by asserting (1) that certain payments made from funds of the bankrupt to the payee of the note were voidable preferences (a Type 1 counterclaim) and (2) seeking recovery also of an unpaid stock subscription owed the corporation by the claimant (a Type 4 counterclaim). Judgment was rendered for the Trustee on both counterclaims. After the District Court had sustained the Referee's finding of summary jurisdiction, the Circuit Court of Appeals, sitting *en banc*, affirmed as to the judgment for the amount of preferences, but reversed the judgment for the amount of the stock subscription. *Katchen v. Landy*, 336 F.2d 535 (10th Cir. 1964). The Trustee did not seek review of the adverse decision on the stock subscription; only the claimant appealed. In affirming, this Court noted that the decision below had made no distinction between Type 1 and Type 2 counterclaims; in like vein, this Court made no distinction between these types of counterclaims in its decision (see 382 U.S. at 326n.1). Starting with the proposition that the Bankruptcy Act leaves the exact scope of summary proceedings in bankruptcy undefined, this Court made certain value judgments in balancing the arguments that a claimant is entitled to a jury trial in a plenary proceeding against the bankruptcy goal of inexpensive and efficient administration of a bankrupt's estate. Thus, as the opinion in *Katchen* observed:

> "[T]his Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and set'le-

> ment of the estate of all bankrupts within a limited period,' [cite] and that provision for summary disposition, 'without regard to usual modes of trial attended by some necessary delay,' is one of the means chosen by Congress to effectuate that purpose, [cite]." (382 U.S. at 328).

In addition, the power granted bankruptcy courts by §2a(2) of the Bankruptcy Act to "allow", "disallow" and "reconsider" claims, a power of basic importance, "is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit". (*Id.* at 329). Finally, this Court noted that

> "The [Bankruptcy] Act itself directs that '[o]bjections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claims will permit,' Bankruptcy Act, §57, sub. f . . . and a committee report indicates that the provision means that '[o]bjections shall be heard and determined in a summary way,' . . . ." (*Id.* at 330).

Only after this extended discussion of the need for summary determination of objections to claims and for the efficient administration of bankrupts' estates, a discussion which placed great reliance upon *Alexander v. Hillman*, did this Court turn to a consideration of the provisions of §57g of the Bankruptcy Act. In interpreting *Katchen v. Landy*, the court below and the other circuits which have considered the question have misconstrued what is perhaps the most crucial sentence contained in this Court's opinion: "The objection under §57, sub. g is, *like other objections*, part and parcel of the allowance process and is subject to summary adjudication by a bankruptcy court." (*Id.* at 330; em-

phasis supplied). Thus, when the court below emphasized the statement in *Katchen* to the effect that only an objection to a claim under §57g is "part and parcel of the allowance process" . . ., it ignored the words italicized above. The clear meaning of this Court's language in *Katchen* is that *all* objections to claims are "part and parcel of the allowance process", and that a §57g objection has no greater import than does any other objection.

Concluding its discussion of the jurisdictional problems posed in *Katchen*, this Court stated:

> "What we said in Alexander v. Hillman . . . in connection with the jurisdiction of a receivership court to entertain a counterclaim against a claimant in the receivership proceeding is equally applicable here:
>
> 'By presenting their claims respondents subjected themselves to all the consequences that attached to an appearance.'" (382 U.S. at 335)[1]

Numerous commentators, reacting to the decision in *Katchen v. Landy*, have uniformly thought that it would be most beneficial in the administration of bankruptcy estates were all counterclaims asserted by a trustee to fall within the penumbra of that decision's rationale. For example, Referee Saul Seidman has stated that the

---

[1]The final portion of the opinion in *Katchen v. Landy* deals with the contention made by the claimant that he was entitled to a jury trial. After extended discussion, the opinion concludes by holding that the trustee's objection was within the Congressional rationale in subjecting 57g counterclaims to the summary jurisdiction of the Bankruptcy Court. Were this Court to conclude that the counterclaim asserted by the Petitioners in the case at bar was also within that jurisdiction, this Court's discussion of the right or lack of right to a jury trial would be apposite.

reasoning in *Katchen v. Landy* "could logically support summary jurisdiction to determine any counterclaim related or not to the subject matter of the creditor's claim." Seidman, *Katchen v. Landy—Some Implications,* 71 Com. L.J. 241, 243 (1966). Referee Seidman goes on to state:

> "[The theory of Katchen v. Landy is a 'res' theory:] that by filing the claim [the creditor] is asserting an equitable claim to a share of the res which the Court may determine in summary fashion. . . . [I]t seems to me that the res theory together with the analogy of Alexander v. Hillman, dealing with equitable receiverships, would justify a hope that there may be an extension of jurisdiction [to permissive counterclaims]." (*Id.* at 243).

See also Rochelle and King, *Summary Jurisdiction in Bankruptcy: Katchen v. Landy and Questions Left Unanswered,* 1966 Duke L.J. 669, 680-681; Macey, *Katchen v. Landy: The Summary Jurisdiction Road,* 71 Com. L.J. 68, 69 (1966).

The decision by the court below, if permitted to stand, would place proceedings regarding permissive counterclaims in the posture in which some courts had placed §57g counterclaims prior to *Katchen v. Landy.* Prior to *Katchen,* some courts had held that the claim and the counterclaim should be held in abeyance until plenary litigation were concluded on the question of the voidability of the alleged §57g transfers. This, of course, resulted in extreme delay in concluding the administration of bankruptcy estates. Other courts met the problem by permitting the bankruptcy court to hear the counterclaim, deciding the case, but refusing

to award affirmative relief. When the trustee filed his plenary suit, the decision on the merits in the bankruptcy court was held to be *res judicata*, and the only function of the plenary suit was the entry of the judgment against the claimant. See generally, Palmer, *The Supreme Court Speaks On Bankruptcy*, 40 Ref. J. 44, 45 (1966).

The present case is illustrative of the posture in which permissive counterclaims would be placed were the decision of the court below to be upheld. Respondents filed claims based upon two tracts of land. Petitioners' counterclaims related to other parcels of land, although the joint venture agreements between Farrell and Respondents were similar. The bankruptcy court has jurisdiction to determine the trustees' objections to the two parcels with which the claims were concerned, but no jurisdiction to determine objections relating to the other parcels. Just stating the proposition shows its deleterious effect upon the administration of bankruptcy estates, and highlights the unnecessary and duplicative tasks which must be undertaken by Petitioners in administering the LATD estate.

That a like state of affairs should not be permitted to endure in the context of non-§57g counterclaims was seen clearly by the court in *In re Seatrade Corp.*, 297 F.Supp. 577, 581 (S.D.N.Y. 1966), which involved a non-§57g compulsory counterclaim. In opining that *Katchen v. Landy* had settled the issue with respect to permissive counterclaims, the court stated that there was "no good reason why summary jurisdiction should not lie regardless of whether the counterclaim is compulsory or permissible", citing Seligson and King, *Jurisdiction and Venue in Bankrupcy*, 36 Ref. J. 73, 83 (1962).

The leading authority on bankruptcy, *Collier on Bankruptcy,* has reached the same conclusion. Looking first at the power granted bankruptcy courts by §68 of the Bankruptcy Act, 11 U.S.C. §108, to set off mutual debts and credits between the bankrupt and his creditors, he concluded that a bankruptcy court has summary jurisdiction in all cases to decide any counterclaim which is asserted only to reduce or extinguish the claim filed by the claimant. Thus, a hearing would be held by the referee in which he would determine that the counterclaim was valid, but he would be in no position to render an affirmative judgment. The Trustee would then have to file a plenary action and the decision on the merits, rendered by the referee, would be *res judicata* on the question of liability. This state of affairs led Collier to conclude that:

> ". . . One who files a proof of claim should be held to acquiesce in the adjudication of any proper setoff or counterclaim even to the extent of a judgment thereon, since as pointed out in the *Kresge* case [*Florance v. Kresge,* 93 F.2d 784 (4th Cir. 1938)] the claimant puts himself in a position, should his interests warrant, to challenge the receiver's or trustee's acts and demands of others claiming as creditors. He should not be permitted to claim the benefits of such a position, and yet maintain a favored advantage as against the trustee or receiver, compelling that officer to resort to a plenary action to collect on a claim that is a proper subject of set-off or counterclaim. In *Katchen v. Landy,* the Supreme Court allowed the exercise of summary jurisdiction on the basis of the filing of a proof of claim where the trustee sought to recover a voidable preference from

the creditor. The basis for the holding was application of §57g requiring disallowance of a claim asserted by one who had received a voidable preferance. While §57g is not applicable to the set-off situation of §68, many of the same reasons as herein expressed are present in both cases. It would certainly appear likely that the bankruptcy court may proceed by way of summary jurisdiction where a compulsory counterclaim is involved, and it should not be prohibited from so proceeding even if the counterclaim is merely permissive." (4 Collier on Bankruptcy, ¶68.20[4] at 951 (14th ed. 1971).)

Further support for the proposition advanced here may be found in General Order 37 and Federal Rule of Civil Procedure 13(b). G.O. 37 states that:

> In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these General Orders, be followed as nearly as may be. . . .

Federal Rule 13(b) provides that

> "A pleading may state as a counterclaim any claim against his opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

As this Court pointed out more than once in *Katchen*, the exact scope of summary jurisdiction of a bankruptcy court has been left undefined in the Bankruptcy Act. The presumption should be that, unless something to the contrary is to be found in the Bankruptcy Act or in the General Orders, Federal Rule 13(b) is appli-

cable to bankruptcy proceedings. One searches in vain for any indication that Rule 13(b), regarding permissive counterclaims, is inconsistent with any of the provisions of the Act or the General Orders. Absent such an indication, Federal Rule 13(b) should govern the summary jurisdiction of the bankruptcy court in hearing permissive counterclaims. As was *Katchen v. Landy*, this Court's decision in this case should be

> ". . . governed by the 'traditional bankruptcy law that he who invokes the aid of the Bankruptcy Court by offering a proof of claim and demanding its allowance, must abide the consequences of that procedure. [cite]' Gardner v. State of New Jersey, 329 U.S. 565, 573, 67 S.Ct. 467, 472. . . ." (382 U.S. at 332n.9.)

B. Section 2a(7) of the Bankruptcy Act Does Not Apply to a Counterclaim Asserted by a Trustee in Bankruptcy.

As an alternative basis for its decision, the court below held that the Respondents had timely asserted objections to the bankruptcy court's summary jurisdiction over the counterclaim asserted by Petitioners. Implicit in that holding is the conclusion that a potential claimant has two chances to avoid the summary jurisdiction of the bankruptcy court; first, by not filing a claim; secondly, by making a §2a(7) objection after a counterclaim has been filed by a trustee. Also implicit in the holding is the conclusion that, indeed, a claimant may submit himself to summary jurisdiction with regard to permissive counterclaims, but that that consent may be withdrawn if a §2a(7) objection

is made in timely fashion. Such a rationale not only refutes the proposition advanced by Petitioners in this Petition but, more importantly, refutes the decision of this Court in *Katchen v. Landy*. If indeed §2a(7) is to be interpreted as applying to objections to jurisdiction made after a trustee has filed a counterclaim, it would apply irrespective of the nature of the counterclaim.

There is no reason whatever to think that §2a(7) is intended to be applicable once a claim has been filed by a creditor of a bankrupt. While it may be true that an objection may be asserted to the jurisdiction of the bankruptcy court to hear permissive counterclaims, the standards for measuring the timeliness of such an objection are not those of §2a(7). Thus, it has been noted that §2a(7) "probably does not apply to claims, but apparently applies only where the adverse party is involuntarily brought into court", by way of an order to show cause, for example. Rochelle and King, *op. cit supra*, at 672n. 20. If permitted to stand, the result which this Court was trying to accomplish in *Katchen v. Landy* will have been eroded, and the chaos surrounding counterclaims asserted by trustees which preceded that case will have arisen once again.

Taken together, the alternative holdings by the court below represent a severe retrogression in the march toward inexpensive and expeditious administration of bankruptcy estates. It is for this Court to provide the explicit guidelines by which the reach of bankruptcy court jurisdiction is to be measured. There is no ques-

tion but that, due to the extremely important nature of the questions presented by this case, and cases like it, appeals will be taken to the Circuit Courts of Appeal of those circuits which have not yet spoken thereon. Probably no questions of more import exist today in bankruptcy administration than those presented by the case at bar. For these reasons, Petitioners respectfully request that this Court grant a writ of certiorari.

MARTIN GENDEL,
RICHARD F. BROUDE,
Attorneys for Stanley Phipps, James A. A. Smith and George E. Danielson, Trustees.

APPENDIX.

Findings of Facts and Conclusions of Law Re Joint Venture.

United States District Court, Central District of California.

In the Matter of Los Angeles Trust Deed & Mortgage Exchange, a California corporation, and dba Trust Deed & Mortgage Markets, a California corporation, Bankrupt. In Bankruptcy No. 119,178-Y.

Filed Nov. 19, 1968.

This matter having come on for hearing on September 6, 1966, and having been continued from time to time until final hearing on June 13, 1968, at 2:00 P.M. before the Honorable Ronald Walker, Referee in Bankruptcy, in his courtroom 304 in the United States Court House, Temple and Spring Streets, Los Angeles, California, upon the application for decree dissolving joint ventures and for an account and for a turn over of money brought by Stanley A. Phipps, James A. A. Smith, and George E. Danielson, the trustee in bankruptcy thereof, and

The trustees having appeared through their counsel TIERNAN & MONEYMAKER by Richard M. Moneymaker and Associates Funding, Inc., a California corporation, Westport Development Company, a co-partnership composed of E. J. Cantillon and A. W. Rabalais, and Brentwood Downs, Inc., a California corporation, having appeared by written answer and through their counsel, John E. Glover, and evidence both oral and documentary having been introduced and all parties having stipulated in writing to certain facts which stipulation was accepted by the court, and good cause appearing therefor, the court now finds and concludes as follows:

FINDINGS OF FACT

I.

That Associates Funding, Inc. and Brentwood Downs, Inc. are California corporations whose officers and principal stockholders are Mr. E. J. Cantillon and A. W. Rabalais. Westport Development is a partnership composed of said E. J. Cantillon and A. W. Rabalais. That these entities will be collectively referred to hereafter as respondents.

II.

That the bankrupt corporation purchased a series of promissory notes and deeds of trust from respondents as part of the development of certain tracts of land in Orange County, California, during the years 1958 and 1959.

III.

That David Farrell, hereinafter referred to as Farrell, was president of the bankrupt corporation. That as part of the financing of the development of the tracts of land, by the purchase of notes and trust deeds by the bankrupt corporation, Farrell and the respondents entered into and executed a series of written agreements which provided that Farrell should share in the profits derived from the development of said tracts.

IV.

On December 8, 1958, Farrell, Westport Development Company, and Associates Funding executed a written agreement which provided Farrell was to receive 50% of any and all net profits accruing to said respondents from the sale of lots in Tract 3328.

V.

Sometime in 1959, Farrell, Westport and Associates executed a written agreement which provided Farrell was to receive 50% of any and all net profits accruing from the sale of lots in Tracts 3312 and 2371.

VI.

That on January 12, 1959 Farrell, Westport and Associates executed a written agreement which provided that Farrell was to receive 50% of any and all net profits accruing from the sale of lots in Tract 3278.

VII.

That on February 9, 1959, Farrell, Westport and Associates executed a written agreement which provided that Farrell was to receive 50% of any and all net profits accruing from the sale of lots in Tract 2222.

VIII.

That on December 18, 1960, the above-entitled bankrupt corporation was adjudicated as such in this district upon a petition filed against it by its creditors.

IX.

That on January 27, 1961, Stanley A. Phipps, James A. A. Smith, and George E. Danielson were elected trustees in bankruptcy, and hereinafter are referred to as Trustees.

X.

That on November 27, 1962, an order was made in this court by Referee in Bankruptcy Ronald Walker, assigning all interest in all of the assets of Mr. and Mrs. David Farrell to these Trustees, including all of his interest in the agreements mentioned in Findings of Fact IV, V, VI & VII.

XI.

That on July 26, 1961, Associates Funding, Inc. filed claim number 7777 in these proceedings for the sum of $11,679.57, for money allegedly still owing to it by the bankrupt corporation for the sale of trust deeds and notes from Tract 3492 in Anaheim, California.

XII.

That on July 26, 1961, Associates Funding Inc. and Brentwood Downs filed claim number 7779 in these proceedings for $24,916.68 for moneys allegedly still owing to them by the bankrupt corporation for the sale of trust deeds and notes on Tract 3419 in Anaheim, California.

XIII.

That certain creditors of the bankrupt corporation have filed an action for fraud against respondents in the United States District Court case number 727-61-Y in connection with their purchase of notes and trust deeds through the bankrupt corporation on Tract numbers 3419, 2222, 3492, 3328, 3278, 3488 and 3186 and seek damages for fraud in excess of $700,-000.00. Said suit has never gone to trial.

XIV.

That on March 31, 1966, the firm of Strin, Silver and Pecora, the C.P.A.'s for the respondents, prepared an audit on the tracts in question. This audit shows that the following profits were made on the following tracts:

Tract 3278	$28,957.87
Tract 3312, 2371	2,182.66
Tract 3328	6,136.31
Tract 2222	10,479.63
Total	$47,756.47

XV.

This audit was the first known accounting rendered on the profits made on said tracts.

XVI.

That both the respondents and Farrell always treated each tract and agreement as separate and apart from each other tract and agreement. That all were executed at separate times and in connection with the purchase by the bankrupt corporation of separate and different notes and trust deeds on different tracts of land in Orange County, California.

CONCLUSIONS OF LAW

I.

That all right, title and interest of all of the assets of this estate vested in the Trustees by operation of law on December 18, 1960.

II.

That among the assets of this estate, which now has passed to these Trustees, is all of Farrell's interests in the written agreements referred to in Findings of Facts Nos. IV, V, VI, and VII.

III.

That the written agreements described in Findings of Fact Nos. IV, V, VI and VII are joint ventures, each separate and apart from the other. That no losses on any other joint ventures, agreements or other transactions can be set off against the profits of the aforementioned.

IV.

That these joint venture agreements were supported by valuable consideration, in that the respondents re-

ceived the benefit of having the bankrupt corporation purchase notes and trust deeds from them.

V.

That respondents have no defense of usury since these agreements do not constitute loans, but joint ventures. Farrell had no right to receive any money unless profits accrued from the sale of lots in the aforementioned tracts.

VI.

That the respondents cannot offset their claims against the bankrupt corporation, as set forth in Findings of Fact, Nos. XI, and XII against the interest of Trustees, in these joint ventures since the debts are not mutual obligations as required by Section 68 of the Bankruptcy Act for the following reasons:

1. The debts of the bankrupt corporation and Farrell's claim for profits are not mutual obligations since the bankrupt corporation and Farrell are different and distinct entities.

2. The claims of respondents derive from Tracts other than the ones Farrell has a claim against for profits, and each tract and joint venture was treated separately by both respondents and Farrell.

3. The claims of respondents are for monies owing from the sale of notes and trust deeds. Farrell's claims are for profits derived from the sale of lots.

VII.

The cause of action for a dissolution of the joint ventures and an accounting is not barred by any statute of limitations, nor by laches, since no cause of action was created until the accounting was made March 31, 1966. This application was filed July 29, 1966, well within the four year period of Civil Code of Procedure Section 343.

VIII.

That the execution of the joint ventures were in no way in violation of the Corporate Securities Act of California.

IX.

That an unfavorable ruling in the fraud action referred to in Finding of Fact No. XIII, would reduce the profits attributable to the tracts involved. That, however, this court can give a judgment conditional upon a favorable disposition of said pending action so that Trustees could then have standing to seek a dismissal of said pending action for lack of prosecution.

X.

That no evidence has been introduced by the respondents to support any of the other affirmative defenses raised by the respondents.

XI.

That this court has summary jurisdiction of this controversy by reason of the filing of the claims in this estate by the respondents, and by consent in their litigating this controversy.

XII.

That these trustees are entitled to a judgment amounting to 50% of the profits realized on the tracts referred to in Findings of Fact No. XIV against all of the respondents. That said judgment is in the sum of $23,883.20 and bears interest at the legal rate of 7% per annum from March 31, 1966, the date of the audit.

DATED: November 19, 1968.

/s/ Ronald Walker
Ronald Walker
Referee in Bankruptcy

Order Declaring Dissolution of Joint Venture for Payment of Money.

United States District Court, Central District of California.

In the Matter of Los Angeles Trust Deed & Mortgage Exchange, a California corporation, and dba Trust Deed & Mortgage Markets, a California corporation, Bankrupt. In Bankruptcy No. 119,178-Y.

This matter having come on for hearing on September 6, 1966, and having been continued from time to time until final hearing on June 13, 1968, at 2:00 P.M. before the Honorable Ronald Walker, Referee in Bankruptcy, in his courtroom 324 in the United States Court House, Temple and Spring Streets, Los Angeles, California, upon the application for decree dissolving joint ventures and for an account and for a turn over of money brought by Stanley A. Phipps, James A. A. Smith, and George E. Danielson, the trustees in bankruptcy thereof, and

The trustees having appeared through their counsel TIERNAN & MONEYMAKER by Richard M. Moneymaker and Associates Funding, Inc., a California corporation, Westport Development Company, a co-partnership composed of E. J. Cantillon and A. W. Rabalais, and Brentwood Downs, Inc. a California corporation, having appeared by written answer and through their counsel, John E. Glover, and evidence both oral and documentary having been introduced and all parties having stipulated in writing to certain facts which stipulation was accepted by the court, and good cause appearing therefor, and on the basis of the court's findings of facts, and conclusions of law,

IT IS ORDERED that the joint ventures relating to tracts Nos. 3278, 3312, 2371, 3328 and 2222, all located in Orange County, California, involving David Farrell, Associates Funding Inc., Brentwood Downs, Inc., both California corporations, and Westport Development Company, a co-partnership composed of E. J. Cantillon and A. W. Rabalais, are hereby dissolved, and

IT IS FURTHER ORDERED that Associates Funding, Inc., Brentwood Downs, Inc., and Westport Development Company pay over to this estate the sum of $23,883.20, together with interest thereon at the legal rate of 7% per annum from April 1, 1966, until paid in full, and

IT IS FURTHER ORDERED that the above-mentioned sum of $23,883.20 plus interest at the rate of 7% per annum from April 1, 1966, will be reduced by the amount of any judgment rendered against said Associates Funding, Inc., Brentwood Downs, Inc. or Westport Development Company in that United States District Court action No. 727-61-Y, and no execution on this judgment shall issue until case No. 727-61-Y is terminated by final judgment or dismissal.

DATED: November 19, 1968.

/s/ Ronald Walker
Ronald Walker
Referee in Bankruptcy

Order Affirming Order of Referee in Bankruptcy.

United States District Court, Central District of California.

In the Matter of Los Angeles Trust Deed & Mortgage Exchange, a California corporation, and dba Trust Deed & Mortgage Markets, a California corporation, Bankrupt. In Bankruptcy No. 118178Y

This matter having come on for hearing on Monday April 14, 1969 before the Honorable Harry C. Westover, the United States District Court Judge in his courtroom, United States Courthouse Building, Temple and Spring Streets, Los Angeles, California, upon the Petition for Review filed by the respondents, Associates Funding, Inc., a California Corporation, Brentwood Downs, Inc., a California Corporation, and Westport Development Company, a co-partnership composed of E. J. Cantillon and A. W. Rabalais, and respondents having appeared through their counsel John E. Glover and Adele O. Carver, and the Trustee in Bankruptcy of the bankrupt estate of Los Angeles Trust Deed & Mortgage Exchange, a California Corporation having appeared through their counsel Tiernan and Moneymaker by Richard M. Moneymaker, and the Court having read the Memorandum of Points and Authorities, and the supplemental exhibit filed by the petitioners at the hearing; having concluded that there is no merit to their contentions that the bankruptcy Court was without jurisdiction of the subject matter, and that the contracts in question were void by reason of lack of

consideration illegality, or the statute of limitations, and good cause appearing therefor,

IT IS ORDERED that that Order of Referee Ronald Walker dated November 19, 1968 declaring dissolutions of joint ventures and for payment of money, and Ordering respondents to pay over to this estate the total sum of $23,883.20 together with interest thereon at the legal rate of 7% per annum from April 1, 1966 until paid in full,

IT IS HEREBY AFFIRMED.

DATED: April 12, 1969.

/s/ Harry C. Westover
Harry C. Westover,
Judge Presiding

United States Court of Appeals for the Ninth Circuit.

In the Matter of Los Angeles Trust Deed & Mortgage Exchange, Bankrupt, Associate Fundings, Inc., Brentwood Downs, Inc., and Westport Development Co., Appellants, v. Stanley A. Phipps, et al., Appellees. No. 25393.

Appeal from the United States District Court for the Central District of California

Before: MERRILL, DUNIWAY and CHOY, Circuit Judges. CHOY, Circuit Judge:

This action stems from certain free-wheeling activities of David Farrell, president and principal shareholder of Los Angeles Trust Deed & Mortgage Exchange (Exchange). In late 1958 and early 1959, Exchange financed several ventures of Edmund Cantillon and Alvin Rabalais, who were in the business of developing real property, mostly in Orange County, California.

Cantillon and Rabalais operated via different legal entities—sometimes as a co-partnership under the name Westport Development Co. (Westport), sometimes through either of two corporations, Associate Fundings, Inc. (Associate) or Brentwood Downs, Inc. (Brentwood). They negotiated an arrangement with Farrell whereby Exchange would loan funds at 10% interest to one or more of the Cantillon-Rabalais legal entities, with trust deeds as security. In addition, Farrell personally was to receive 50% of the net profits on each tract financed by Exchange. During 1958 and 1959, Exchange financed development of seven tracts under this arrangement. In every situation, the secured loan with 10% interest was set forth in one document and the agreement to share profits with Farrell was set forth in another.

On December 18, 1960, Exchange was adjudicated bankrupt. In July 1961, Cantillon and Rabalais filed with the bankruptcy referee two claims related to loans on two of the seven tracts. On July 29, 1966, the trustees, after acquiring both Farrell's and Exchange's interest,[1] filed a counterclaim, praying that the referee dissolve the Cantillon-Rabalais "joint ventures" with Farrell and order payment to the trustees of 50% of the profits earned on the five tracts which were not included in the claims filed by Cantillon and Rabalais. Based upon certain documents, an audit of the profits on the five tracts and a stipulation of facts, the referee ordered the joint ventures to be dissolved and ordered Westport, Associate and Brentwood to turn over 50% of the net profits on the tracts. The district judge affirmed the order and this appeal followed.

1. *Filing Claims as a Basis for Summary Jurisdiction on Counterclaim.*

The trustees contend that the referee correctly exercised summary jurisdiction over their counterclaim, based upon *Katchen v. Landy*, 382 U.S. 323 (1966), wherein the Supreme Court held that "the [Bankruptcy] Act does confer summary jurisdiction to compel a claimant to surrender preferences that under §57g would require disallowance of the claim." 382 U.S. at 335.

---

[1][reference on p. 2]

In November, 1962, trustees for Exchange acquired Farrell's interest in 50% of the profits of the ventures. This was the result of a compromise of a controversy between the trustees on the one hand and Farrell, his wife and various Farrell entities on the other hand. The controversy was also occasioned by the divorce of Farrell and his wife. The agreement was embodied in an order of compromise, which consolidated the holdings of Farrell and Exchange under the auspices of the trustees in bankruptcy.

The trustees would have us interpret *Katchen* broadly to confer summary jurisdiction to determine counterclaims based on transactions which are separate[2] from the subject matter of creditors' claims. We decline to interpret *Katchen* in such a broad manner.

The Court emphasized in *Katchen* that an objection to a claim under §57g is "part and parcel of the allowance process" 382 U.S. at 330, and as such subject to the jurisdiction of the bankruptcy referee. Also, as "part of the process of allowance and disallowance of claims it is triable in equity." 382 U.S. at 336, and thus no right to jury trial exists.[3]

After a review of the language of the Bankruptcy Act and the underlying policies, we believe that the referee had no jurisdiction over a counterclaim, unrelated to the transaction upon which a creditor's claim is based. The Act does not make counterclaims a subject of objection to a claim. In *Peters v. Lines*, 275 F.2d 919 (9th Cir. 1960), this circuit ruled that the

---

[2][reference on p. 2]

Although the contracts for each tract were identical and later ones were routinely executed without further negotiation, the referee found that the parties treated the financing for each tract as a separate transaction. The determination is not "clearly erroneous" and we abide by it in this appeal.

[3][reference on p. 3]

The Supreme Court did not consider in *Katchen* the issue presented by the instant case. At the court of appeals level, the Tenth Circuit ruled that a bankruptcy referee does not have jurisdiction to hear counterclaims arising out of separate transactions. *Katchen v. Landy*, 336 F.2d 535 (10th Cir. 1964). Unfortunately, the trustee did not appeal this aspect of the court of appeals' decision. *Katchen v. Landy*, 382 U.S. 323, 326 (1966).

filing of a claim constitutes a consent to summary jurisdiction of the referee and enables the referee to render affirmative relief on a trustee's counterclaim arising out of the same transaction as a claim submitted by the creditor. Settlement of the transaction itself had already been tendered to the referee. Thus, in "submitting one side of a controversy for resolution logic dictates that the entire controversy should be open for resolution." 275 F.2d at 925. The distinction between such a case and an unconnected counterclaim was carefully noted. 275 F.2d at 925, fn. 6.

The trustees have not persuaded us that *Katchen* requires that we abandon the distinction we established in *Peters*. That the referee lacked jurisdiction over the trustees' counterclaim may be expressed in affirmative terms: Cantillon and Rabalais, i.e., their legal entities, had a right to have their interests in the dispute (stemming from the five unrelated transactions) adjudicated in a plenary action rather than in a bankruptcy proceeding. *See 2 Collier on Bankruptcy* ¶23.08[1], pp. 530-531. Therefore, we hold that the bankruptcy referee did not have summary jurisdiction over the trustees' application for dissolution of the Cantillon-Rabalais joint ventures.[4] Financing of these five tracts was separate from the transaction that constituted the subject matter of the Cantillon-Rabalais claims.

---

[4][reference on p. 4]

Accord: In re Carnell Construction Corp., 424 F.2d 296 (3rd Cir. 1970); *Katchen v. Landy*, 336 F.2d 535 (10th Cir. 1964); *Cherno v. Engine Air Service, Inc.*, 330 F.2d 191 (1964).

II. *Consent to Summary Jurisdiction by Waiver of Right to Object.*

Ordinarily, a challenge to summary jurisdiction in bankruptcy must be asserted by a creditor to the referee at an early stage in the proceedings. Otherwise, the creditor is deemed to have waived the right; he is deemed to have consented to the summary jurisdiction. *See* 2 *Collier on Bankruptcy*, ¶23.08[4], pp. 536-547.

Section 2a(7) of the Bankruptcy Act, 11 USC §11 (a)(7), the source of the consent jurisdiction, provides:

> ". . . and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

The trustees contend that Cantillon and Rabalais waived this right by failing to object to summary jurisdiction in a timely manner. We disagree.

On October 7, 1966, at the request of the trustees, the referee in bankruptcy held a hearing to "pre-try" the controversy and "narrow the issues." At that time, counsel for Cantillon and Rabalais filed an answer which raised several defenses not including lack of summary jurisdiction. However, counsel made oral objec-

tion to the jurisdiction of the referee.[5] An amended answer was filed on February 8, 1967, raising the additional defense of lack of jurisdiction.

Rule 12(h) of the Federal Rules of Civil Procedure provides that all defenses—including lack of personal jurisdiction—not raised by preliminary motion or by answer are waived, with certain exceptions not applicable here. The waiver rule is modified by liberal allowances for leave to amend under Rule 15(a).

Fairly read, we believe that the colloquy quoted in the margin indicates that the referee granted leave to amend, when counsel for Cantillon and Rabalais orally

---

[5][reference on p. 4]

MR. MONEYMAKER [Counsel for Trustees]: I don't believe there is any objection to jurisdiction.

THE REFEREE: They are going about, in any event, raising that objection.

MR. GLOVER [Counsel for Cantillon and Rabalais]: We are certainly raising it now, and we have raised it before [on discovery].

. . .

MR. GLOVER: . . . We are certainly objecting to the—you pointed out that it hasn't been pleaded. We objected when we were here before on the same theory, that this was a matter for the Trustee to file an action on if he wants to enforce these contracts.

That is our objection, good or bad.

THE REFEREE: I suggest you file a supplement to your response and set up any objection to jurisdiction.

Now, we will see how far we can go on this pretrial. . . .

After discussing other matters, the referee mentioned the jurisdiction objection again.

THE REFEREE: Apparently there is no dispute that there are then a number of contracts covering a number of tracts, and maybe you can reach a stipulation that these are the terms in all of them, setting forth any language which is agreeable to both of you. It will save an awful lot of trouble: and all of this is without prejudice to your objection to jurisdiction.

objected to summary jurisdiction at the pretrial hearing. However, the Federal Rules of Civil Procedure are applicable to bankruptcy proceedings only insofar as they do not contradict other special bankruptcy rules.[6] It is therefore necessary to examine what has historically been a very thorny problem for bankruptcy practitioners, the courts and Congress.

Congress adopted §2a(7) of the Bankruptcy Act in 1952[7] in order to modify the rule of *Cline v. Kaplan*, 323 U.S. 97 (1944), that an adverse party could object to the summary jurisdiction of a bankruptcy referee so long as the objection was "formal" and was made at any time before the entry of a final order in the proceeding.[8]

---

[6][reference on p. 5]

Following passage of the Bankruptcy Act in 1938, the Supreme Court promulgated General Orders, effective February 3, 1939. General Order 37 provides:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be . . ."

See 1 *Collier on Bankruptcy*, ¶2.81, p. 390.40.

[7][reference on p. 5]

Pub. L. 456 (S.2234), 82d Cong., 2d Sess.

[8][reference on p. 5]

See 2 *Collier on Bankruptcy*, ¶23.08[4], pp. 543-545. The drawbacks of *Cline* were stated in a House Report as follows:

> ". . . This holding has unsettled sound procedure and an expeditious administration in bankruptcy. A respondent may now proceed on the merits and gamble on a favorable decision. When he perceives or fears that the decision will be against him on the merits, he may interpose his formal objection to jurisdiction at any time before the entry of the order, and, should his objection be sustained, the summary proceeding must be dismissed. In such event, the trustee is required to relitigate the issues in a plenary action.

(This footnote is continued on next page)

The trustees contend that Cantillon and Rabalais waived the right to object to summary jurisdiction because they did not comply with Local Bankruptcy Rule 203 of the United States District Court (C.D. Cal.), which provides:

> "A respondent desiring to contest a summary proceeding against him, shall serve and file not less than two (2) days before the hearing a written answer, objection or other responsive pleading which shall be verified if it sets up matters of fact."

We are thus faced with the issue of whether the local rule's requirement of a written objection is subject to leave to amend. We hold that it is.

The legislative history of §2a(7) clearly indicates that Congress passed the provision to deter forum skipping by adverse claimants, by requiring that an objection to summary jurisdiction of the bankruptcy referee be made in an explicit manner at an early stage in the proceedings. The section specifically states that the time for a written objection may be "extended by order of the court." This authorizes the bankruptcy referee to grant leave to amend when an oral objection is so made as to leave little doubt about the basis of the objection and at a time when the opposing party has not incurred substantial costs by proceeding in more

---

"The proposed amendment is intended to overcome this unsatisfactory situation and is keyed to rule 12(h) of the Federal Rules of Civil Procedure, which requires the timely interposition of an objection to jurisdiction and, if not so made, the defense is deemed waived." House Report No. 2320 on S. 2234, 2d Sess. 4 (1952).

See also Sloan, "Procedural Effect of the 1952 Amendment to Sec. 2a(7) of the Bankruptcy Act," 28 J. of Nat'l Ass'n. of Ref. 32 (1954), cited in 2 *Collier on Bankruptcy*, ¶23.08[4], p. 545, n. 48.

than one forum. *Accord: In re Perspectron, Inc.*, 422 F.2d 576 (7th Cir. 1970); Cf. *Hall v. Goggin*, 148 F.2d 774 (9th Cir. 1945); 2 *Collier on Bankruptcy*, ¶23.08[4] p. 546, n. 53. Compare *Honeyman v. Hughes*, 156 F.2d 27 (9th Cir. 1946).

Here, counsel for Cantillon and Rabalais made his oral objection to summary jurisdiction at a pretrial hearing only minutes after filing an answer which did not raise the objection. The objection was just as timely as if it had been in the answer. The trustees were not misled. Leave to amend was wholly appropriate in such circumstances.

III. *Conclusion*

In sum, the bankruptcy referee did not have summary jurisdiction over the legal entities of Messrs. Cantillon and Rabalais. The trustees' counterclaim stemming from separate transactions was not within the referee's jurisdiction, and the creditors raised this defense in a timely manner.

Reversed and remanded.